IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

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**No. 76-529**

MONTANA POWER COMPANY, ET AL., *Petitioners*,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

---

**No. 76-585**

AMERICAN PETROLEUM INSTITUTE, ET AL., *Petitioners*,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

---

**No. 76-594**

INDIANA-KENTUCKY ELECTRIC CORPORATION, ET AL., *Petitioners*,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

---

**No. 76-603**

ALABAMA POWER COMPANY, ET AL., *Petitioners*,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

---

**No. 76-619**

UTAH POWER & LIGHT COMPANY, ET AL., *Petitioners*,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

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**No. 76-620**

WESTERN ENERGY SUPPLY AND TRANSMISSION ASSOCIATES, ET AL., *Petitioners*,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

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**On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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# BRIEF FOR THE STATE OF UTAH AS AMICUS CURIAE

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ROBERT B. HANSEN,
*Attorney General*

WILLIAM C. QUIGLEY,
*Assistant Attorney General*

THE STATE OF UTAH
Capitol Building
Salt Lake City, Utah 84114

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## BRIEF FOR THE STATE OF UTAH AS AMICUS CURIAE

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The State of Utah, appearing by its undersigned Attorney General, respectfully tenders this brief as *amicus curiae* for the consideration of the Court. The State supports the position presented by Petitioners and urges this Court to reverse the decision of the United States Court of Appeals for the District of Columbia Circuit in this case.

## THE INTEREST OF THE STATE OF UTAH

The State of Utah is directly and adversely affected by the decision of the court below. That decision would divest the State of its right, granted by the Clean Air Act, to determine whether and to what extent pollution-control measures more stringent than the national air quality standards should be enforced within its borders. As a result, the decision would greatly reduce the pollution-control options available to the State and would seriously interfere with the State's execution of the air quality management responsibilities vested in it by Congress.

Moreover, the decision poses a threat to the economic development of substantial areas within the State of Utah. With the exceptions of Alaska and Nevada, federal land ownership is more extensive in the State of Utah than in any other state. Under the prevention of significant deterioration regulations promulgated by the Environmental Protection Agency, the State of Utah is deprived of its primary responsibility under the Clean Air Act to control ambient air



quality within its boundaries. Specifically, 40 C.F.R. §52.21(c)(3)(iv) of the regulations has the effect of delegating control of all lands within the State to Federal land managers. Thus, Utah's ability to control its land use and economic development is substantially impaired, if not abrogated. The State has a clear interest in seeking reversal of the decision below.

## ARGUMENT

The ruling of the lower court is in fundamental conflict with Congress's determination concerning the respective roles of the Federal Government and the States in combatting air pollution. The Clean Air Act as amended in 1970 establishes a carefully balanced regulatory scheme: the Federal Government is to establish uniform ambient air quality standards for the protection of public health and welfare; and each State is to develop and implement a plan for achieving those standards or, if it sees fit, more stringent standards. The lower court has decreed a clear departure from this pattern by holding that the Federal Government is authorized by the Clean Air Act to disapprove State implementation plans for failure to provide for the prevention of significant deterioration and to promulgate regulations amending State plans to provide for such prevention. The lower court also permitted to stand regulations that grant to Federal land managers and Indian governing bodies the authority to redesignate Federal and Indian lands within the respec-

tive States. There is no basis whatever in the Act, its legislative history, or decisions of this Court interpreting the Clean Air Act for such interference with the States' performance of the air quality control functions assigned them by Congress.

### I. Congress Did Not Authorize EPA To Impose "Nondeterioration" Requirements On The States

The lower court was unable to find any express statutory support for its holding that the Administrator of EPA must disapprove any State implementation plan that does not preclude significant deterioration of air quality. The sole statutory provision on which it based its decision was Section 101(b)(1) of the Clean Air Act, 42 U.S.C. § 1857(b)(1), which declares one of the purposes of the Act to be

> to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population * * *.

From these words the district court in *Sierra Club* v. *Ruckelshaus,* 344 F.Supp. 253 (D.D.C. 1972) divined a Congressional "intent to improve the quality of the nation's air and to prevent deterioration of that air quality" and declared invalid an EPA regulation that required only that State implementation plans "be adequate to prevent . . . ambient pollution levels



from exceeding . . . [the applicable] secondary standard" 40 C.F.R. § 51.12(b). The court's conclusion that the Administrator must require States to prevent deterioration in the quality of air that exceeds national standards, although there is no provision in the Clean Air Act to that effect, was affirmed *per curiam* by the lower court, 4 E.R.C. 1815 (1972), and by an equal division of this Court, *sub nom Fri* v. *Sierra Club,* 412 U.S. 541 (1973).

The regulations promulgated by the Administrator pursuant to the court's order in the *Ruckelshaus* litigation was upheld by the lower court despite its acknowledgement that "prohibition of significant deterioration of air cleaner than the national standards is not an express requirement of the Act" (A.46a-47a).[1] The court based its decision on its perception from "the legislative history of the Clean Air Act of 1970, a clear understanding that the Act embodied a preexisting policy of nondeterioration of air cleaner than the national standards" (A.55a). As we show in Part II below, there is no support for the lower court's conclusion that the legislative history compels the inclusion of nondeterioration requirements in State implementation plans.

The State of Utah submits that it is clear that in adopting the Clean Air Act Amendments of 1970, Congress established a regulatory scheme in which *national standards* would be the benchmark of air quality. Its manifest purpose was that air of relatively high quality be "protected" against becoming inferior to those standards and that air of relatively low quality

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[1] Reference is to the Appendix filed with this Court pursuant to Rule 36.

be "enhanced" to at least the level of those standards. The only "deterioration" prohibited by the statute is deterioration of air quality to the point where it would not meet the national standards.

Moreover, the court below erred in assuming that whatever Congressional purpose is reflected in Section 101(b)(1) is to be implemented only by mandatory action on the part of the Federal Government. On the contrary, in Section 101(a)(3) of the Act, 42 U.S.C. § 1857(a)(3), Congress found

> that the prevention and control of air pollution at its source is the primary responsibility of States and local governments * * *.

Thus, if the Clean Air Act embodies a policy of minimizing deterioration of air whose quality now exceeds national standards, it is "the primary responsibility of States and local governments" to develop and implement that policy, not the Administrator of EPA. Indeed, Congress quite explicitly assigned that function exclusively to the States.

Finally, a generalized provision such as the "purposes" section of the Clean Air Act surely cannot be read as requiring the Administrator to impose "nondeterioration" standards on the States in the face of specific, substantive provisions of the Act that deny him that authority. Those provisions empower the Administrator to adopt only certain specified national standards, which do not include so-called "nondeterioration" standards, and they authorize him to disapprove a State implementation plan only if it does not make adequate provision for the attainment and maintenance of the national standards. The States remain responsible for determining whether and to what ex-



tent more stringent standards should be enforced within their respective jurisdictions, and all the Act *requires* of the States is that their implementation plans "achieve and maintain" the national standards.

Section 109 of the Act, 42 U.S.C. § 1857c-4, directs the Administrator of EPA to establish national primary ambient air quality standards for the protection of public health and national secondary ambient air quality standards for the protection of public welfare. In addition, Sections 111 and 112, 42 U.S.C. §§ 1857c-6, 1857c-7, direct the Administrator to establish federal standards of performance for new stationary sources and national emission standards for hazardous air pollutants, respectively. These are the only standards (other than for moving sources) that Congress authorized the Administrator to establish, and there is nothing in these provisions that could be read as contemplating the adoption of a "nondeterioration" standard by the Administrator.

Furthermore, Section 110 of the Act, 42 U.S.C. § 1857c-5, *requires* the Administrator to approve any State implementation plan so long as it meets eight conditions specified in that section. These conditions relate only to whether the State plan provides adequately for the attainment and maintenance of the national standards. They contain no direct or indirect reference to preventing the "deterioration" of air whose quality is better than the standards. In short, the statute neither authorizes the Administrator to establish a "nondeterioration" standard nor permits him to disapprove a State implementation plan for failure to include such a standard.

That State implementation plans meeting the criteria imposed by Section 110 *must* be approved by the

Administrator was definitely established by this Court's recent decision in *Train* v. *Natural Resources Def. Council,* 421 U.S. 60 (1975). There, the Court stated that Section 110 "quite clearly mandates approval of any plan which satisfies its minimum conditions," (*id.* at 71 n. 11) and that "[u]nder 110(a)(2), the Agency is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section's other general requirements," (*id.* at 79, emphasis by the Court).

The *Train* decision that the Act *requires* EPA to approve State implementation plans and plan revisions which provide "for the timely attainment and subsequent maintenance of ambient air standards" has been explicitly approved in two subsequent decisions of this Court, *Hancock* v. *Train,* 426 U.S. 167 (1976), and *Union Electric Co.* v. *EPA,* 427 U.S. 246 (1976). In *Union Electric Co.,* this Court pointed out that section 110(a)(2):

> . . . sets out eight criteria that an implementation plan must satisfy, and provides that if these criteria are met and if the plan was adopted after reasonable notice and hearing, the Administrator 'shall approve' the proposed state plan. *The mandatory 'shall' makes it quite clear that the Administrator is not to be concerned with factors other than those specified, Train* v. *NRDC,* 421 U.S., at 71 n. 11, 79, and none of the eight factors appears to permit consideration of technological or economic feasibility. Nonetheless, if a basis is found for allowing the Administrator to consider such claims, it must be among the eight criteria, and so it is here that the argument is focused. (427 U.S. at 257, emphasis supplied).



A unanimous Court held in *Union Electric Co.* that courts are not to review and overturn EPA's approval of a State implementation plan in response to "claims of economic and technological infeasibility" because EPA itself may not "consider such claims in approving or rejecting a state implementation plan" (427 U.S. at 256). And in *Hancock* this Court again acknowledged that under the explicit terms of the Clean Air Act, EPA is *"required* to approve each State's implementation plan as long as it was adopted after public hearings and *satisfied the conditions specified in § 110(a)(2)."* (426 U.S. at 169-170, emphasis supplied).

The court below flatly rejected this Court's clear and unambiguous interpretation of section 110(a)(2) contained in the trilogy of cases in which the Court has spoken on the issue. The lower court's justification for its adherence to its views of the Clean Air Act's commands in this regard rather than this Court's was that *Train* and *Union Electric* "did not consider the issue of nondeterioration" (A.64a), and that critical language repeated by the Court for the third time in *Hancock* was "(dictum)" (A.63a n. 39). The State of Utah respectfully submits that there is nothing in the mandatory language of section 110(a)(2) which this Court interpreted in both *Train* and *Union Electric* and reaffirmed in *Hancock* that in any way creates an exception for the issue of nondeterioration of air cleaner than the national standards.

Indeed, we believe that the case for continued application of the plain language of section 110(a)(2) is, if anything, an even stronger one here than was presented to the Court in either *Train* or *Union Electric.* For although Congress *mandated* only attainment and

maintenance of the national standards, it expressly authorized the States to establish local pollution control standards more stringent than the national standards. It did this by declaring in Section 116 of the Act, 42 U.S.C. § 1857d-1, "the right of any State" to adopt or enforce other pollution standards or limitations so long as they are not less stringent than the national standards. The deliberateness of this legislative action is underscored by the fact that, at the same time Congress left the possibility of bettering the national ambient air quality standards to the States, it specifically preempted them from adopting standards different from the federal emissions standards for motor vehicles, aircraft and fuels, see Sections 209, 211(c)(4), 233, 42 U.S.C. §§ 1857f-6a, 1857-6c(c)(4), 1857f-11.

The statutory pattern could not be more clear: the Administrator must set certain specified national air quality standards and may disapprove State implementation plans only for failure to attain and maintain those standards; and the States must adopt plans that will meet the national standards but are free to enforce standards more stringent than the national standards. The conscious specificity with which Congress made these assignments of duties and responsibilities is at war with any notion that it may have intended to impose a "'nondeterioration" standard on the States by implication. On the contrary, its intention to leave the possibility of bettering national standards for the States to assess is perfectly apparent from the face of the statute.

### II. Legislative History Provides No Support For Any "Non-deterioration" Requirement

The lower court sought to bolster its holding by referring to the legislative history of the Clean Air



Act (A.55a-62a). In view of the clear and unambiguous manner in which Congress expressly assigned the States and not the Administrator the function of considering whether to enforce stricter pollution-control standards, there is no occasion for resort to legislative history, *see, e.g., Packard Motor Co.* v. *NLRB,* 330 U.S. 485, 492 (1947); *United States* v. *Oregon,* 366 U.S. 643, 648 (1961). In any event, however, the legislative history of the Clean Air Act provides no more support for a "nondeterioration" requirement than do the words of the statute themselves.

The statutory provision on which the lower court relied, Section 101 of the Act, became law in 1967, 81 Stat. 485. There is not the slightest indication anywhere in the legislative history of that provision that Congress considered it as embodying a "nondeterioration" policy, much less as authorizing the Federal Government to force any such requirement on the States. Nor did anything in the legislative history of that provision qualify the Congressional judgment expressed in Section 101(a)(3) that "the prevention and control of air pollution at its source is the primary responsiblity of States and local governments" and not the Federal Government.

The provisions of the Clean Air Act effecting the present allocation of pollution-control functions as between the State and Federal Governments were adopted as part of the Clean Air Amendments of 1970, 84 Stat. 1676. The legislative history of the Amendments abounds with evidence of the Congressional purpose to leave the States free to determine whether to adopt standards more stringent than the federal standards, *see, e.g.,* H. Rep. No. 91-1146, 91st Cong., 2d Sess. 1, 8 (1970); S. Rep. No. 91-1196, 91st Cong., 2d

Sess. 2, 10, 15 (1970); 116 Cong. Rec. 19205, 19220, 42384 (1970). The Senate bill would actually have *required* the States to consider and hold hearings on stricter standards, *see* S. Rep. No. 91-1196, *supra,* at 55, 87, but this provision was eliminated at the Senate-House conference, see H. Conf. Rep. No. 91-1783, 91st Cong., 2d Sess. 44 (1970). The fact that Congress thus deliberately refrained from requiring the States to *consider* more stringent standards surely refutes the notion that it intended to *require* the States to *adopt* such more stringent standards.

The scraps of "legislative history" cited by the lower court shed no light on the Congressional purpose in adopting the Clean Air Act. The court attached special importance to a passage on "continued maintenance of * * * ambient air quality" in the Senate Report (A.58a, quoting S. Rep. No. 91-1196, *supra,* at 11), but that passage dealt with provisions in the Senate bill that were never enacted into law, *see Hearings Before a Senate Public Works Subcommittee on Implementation of the Clean Air Act Amendments of 1970,* 92d Cong., 2d Sess. 273-74 (1972). The lower court also placed reliance on a 1969 federal "guideline" and testimony by certain federal officials in 1970 (A.56a n. 30, 57a); however, these statements were made in the context of prior legislation and earlier bills that distributed responsibilities to the States and Federal Government in a manner quite different from the statute as finally passed, and therefore have no probative value for present purposes.



## III. The Regulations Abrogate The Responsibility And Authority Which The Clean Air Act Granted To The States By Providing For Reclassification Of Federal And Indian Lands Independently Of State Control.

### A. The States Have The Primary Responsibility For Assuring Air Quality Within Their Geographical Areas.

Throughout the history of the Clean Air Act, Congress has preserved the basic principle "that the prevention and control of air pollution at its source is the primary responsibility of States and local governments." Section 101(a)(3), 42 U.S.C. §1857(a)(3); *Train* v. *Natural Resources Def. Council,* 421 U.S. 60, 64 (1975). Section 107(a), 42 U.S.C. §1857c-2(a), provides that "[e]ach State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State. . . ." As we pointed out earlier, *supra,* this Court recently reaffirmed the principle of State responsibility in *Hancock* v. *Train,* 426 U.S. 167 (1967) and *Union Electric Co.* v. *E.P.A.,* 427 U.S. 246 (1976).

Senator Muskie, a major proponent of the 1970 amendments to the Clean Air Act, presented to the Senate the Conference Committee's report amending the Act and discussed the importance of State control:

> I have been very much interested in preserving 'local option' features so that *State and local authorities would be able to pursue options among a broad array, seeking a possible way of controlling or preventing air pollution that is most responsive to the nature of their air pollution problem and most responsive to their needs.* In my judgment, the bill will give State and local authorities sufficient latitude in selecting ways to prevent and control air pollution. Senate Committee on Public

Works, 93d Cong., 2d Sess., A Legislative History of the Clean Air Amendments of 1970, 137 (Comm. Print 1974) (emphasis supplied).

Section 52.21(c)(3)(iv) of the regulations, which provides that "the Federal Land Manager may submit to the Administrator a proposal to redesignate any Federal lands to a more restrictive designation than would otherwise be applicable," deprives the State of Utah from controlling and preventing air pollution contrary to explicit provisions of the Act, decisions of this Court, and Congressional intent.

B. The Regulations Have The Operative Effect Of Divesting The State Of Utah Of Control Over Its Ambient Air Quality.

The Administrator recognized that "the Clean Air Act places primary responsibility for the prevention and control of air pollution on the States and local governments" when he proposed the significant deterioration regulations (39 Fed.Reg. 31001)(A.167a). He further acknowledged that:

> [a]ny policy to prevent significant deterioration involves difficult questions regarding how the land in any area is to be used. Traditionally, these land use decisions have been considered the prerogative of local and State governments, and in the regulations promulgated herein, the primary opportunity for making these decisions is reserved for the States and local governments. *Id.*

The fact is, however, that the regulations ultimately promulgated by the Administrator fly in the face of both the provisions of the Clean Air Act and of the Administrator's recognition that "'traditionally" "land use decisions" are prerogatives of local and



State governments. For while the Administrator gives lip service to these truths, the regulations grant Federal land managers authority to independently redesignate Federal lands to the more restrictive Class I designation (Section 52.21(c)(3)(iv)), and Indian governing bodies are also granted redesignation powers over Indian lands within each State's boundaries (Section 52.21(c)(3)(v)). Furthermore, the State of Utah does not have the authority under the regulations to review any redesignation proposal of either Federal land managers or Indian governing bodies. Our only recourse under the regulations is to lodge our objections to any proposed redesignation with EPA, which may determine whether—in *EPA's* "judgment"—the redesignation "appropriately balances" not merely environmental concerns, but social and economic concerns of the redesignated area, the surrounding areas and national interests. It is clear, we submit, that this regulatory scheme is totally at odds with the Congressional edict so plainly set forth in the Clean Air Act that "[e]ach *State* shall have the *primary responsibility* for assuring air quality *within the entire geographic area comprising such State. . . .*" And when the Administrator's candid warning in his explanation of the actual impact of a Class I designation pursuant to the regulations is taken into account, as of course it must be, it will be seen that the practical effect of the delegation of land use authority to Federal land managers and Indian governing bodies in the State of Utah is to turn over control of *all* lands within the State.

> [B]ecause of the small air quality increments specified for Class I areas, these levels can be violated many miles inside an adjacent Class II or III area. For example, a power plant which just

meets the Class II increment for $SO_2$ could under some conditions violate the Class I increment for $SO_2$ 60 or more miles away. Under the regulations promulgated below, a source could not be allowed to construct if it would violate an air quality increment either in the area where the source is to be located or in any neighboring area in the State. Therefore, wherever a Class I area adjoins a Class II or III area, *the potential growth restrictions . . . extends well beyond the Class I boundaries into adjacent areas . . . [I]t should be clear that* the Class II or III increment could only be fully utilized toward the center of the area and that at the periphery, *allowable deterioration will be dictated by the adjoining Class I area rather than the Class II or III increment.* 39 Fed. Reg. 42512 (Dec. 5, 1974) (emphasis supplied) (A. 218a-219a).

Federal lands comprise 66% of the total lands in the State of Utah (Bureau of Land Management, *Public Land Statistics* 10 (1975)). Moreover, because of the ownership pattern of the federal lands there is no private of State land in Utah that is farther than twenty miles from the borders of the federal lands. It is thus manifest from the Administrator's acknowledgment that—despite apparent differences between the Classes established in the regulations for purposes of determining allowable pollution increments—the reality is that "allowable deterioration will be *dictated* by the adjoining Class I area rather than the Class II or III increment" and that the extent of such "*dictation*" could be "60 or more miles." Thus when combining the realities acknowledged by the Administrator concerning the drift factor and the realities of the extent and pattern of Federal land ownership within the State of Utah, there is simply no question that a



consequence of the delegation to Federal land managers is to enable the Federal government to control *all* of the lands within the State of Utah—contrary to the explicit commands of Congress in Section 107(a) of the Clean Air Act and to traditional land use law which the Administrator recognized and then proceeded to blithely ignore.

Should the Court reach the issue whether the Administrator is authorized to thus delegate control over lands within the States, we respectfully urge that this Court adhere to its decisions in *Train, Hancock* and *Union Electric* and strike down the regulations insofar as they thus derogate from the States' primacy in the prevention and control of air pollution within the *entire* geographic areas comprising the States.

## IV. The Regulations Prejudice Sound Air Quality Management.

The decision of the lower court, if allowed to stand, will severely hamper the State of Utah in its efforts to develop and implement an effective, integrated pollution control program for the entire State. Although the air quality exceeds national standards in large portions of Utah, other parts of the State have serious pollution problems. In order to attain and maintain optimum air quality levels throughout Utah, the State's regulatory capability must extend not only to the problem areas but to the high-quality areas as well. The decision below would make such sound air quality management impossible.

By imposing an arbitrary restraint on emissions in areas of high air quality, the Administrator would drastically reduce the pollution-control options available to the State of Utah. For example, the possibility

of alleviating urban pollution by encouraging the location or relocation of industrial enterprises in sparsely populated regions would be denied the State. The State's options would be even more limited in dealing with pollution caused by indigenous commercial expansion in such regions; it would either have to forbid such expansion or subject it to prohibitively expensive emission controls (assuming they are even available).

The unauthorized superimposition of Federal land manager and Indian governing body authority over classification of Federal and Indian lands within Utah severely aggravates the State's problems in this regard, leaving it virtually without control of meaningful options to deal with pollution-abating measures tailored to the needs and aspirations of all of Utah's citizens.

Congress did not intend that the States be thus hobbled in carrying out their air quality management responsibilities under the Clean Air Act. Quite the contrary, it deliberately left them free to determine what control measures should be employed in areas where air quality surpasses national standards. It made very clear its purpose of preserving the States' ability to select which among available options will be most responsive to local problems and needs, *see, e.g.*, 116 Cong. Rec. 32903, 42386 (1970) (statements of Senator Muskie). In short, Congress intended the States to have authority and latitude commensurate with the "primary responsibility" for air pollution control that is assigned them.

The State of Utah has accepted that responsibility and is fully committed to achieving and maintaining the most rigorous level of pollution control that is consistent with the best interests of all of its citizens in



all portions of the State. Indeed, in November 1969, prior to the enactment of the Clean Air Amendments of 1970, the State of Utah expressly adopted the policy "that new pollution sources will be controlled *to protect areas of present high air quality*" (Foreword to Utah Code of Air Conservation Regulations, emphasis supplied).

This policy has since been further refined to provide that

> In areas of present high air quality where measured or estimated ambient levels of controllable pollutants are below the levels specified by applicable standards, any emission of pollutant to the ambient air must be shown to result in pollution levels, as determined by appropriate evaluating procedures, within applicable ambient air standards, and will be prohibited in any case unless shown to be controlled to afford the highest efficiencies and the lowest discharge rates that are reasonable and practicable. . . .

The limits of acceptable control will be determined on a case-by-case basis by the Air Conservation Committee of the Utah State Division of Health. This policy, which is of course more stringent than the standards laid down by the Federal Government, assures the people of the State of Utah that areas presently enjoying high air quality will, to the maximum feasible extent, continue to do so.

## CONCLUSION

For the foregoing reasons, the State of Utah as *amicus curiae* urges the Court to reverse the decision of the court below.

Respectfully submitted,

ROBERT B. HANSEN,
*Attorney General*

WILLIAM C. QUIGLEY,
*Assistant Attorney General*

THE STATE OF UTAH
Capitol Building
Salt Lake City, Utah 84114

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